

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 JAMES HEALY, on behalf of himself and all
11 others similarly situated,

12 Plaintiff,

13 v.

14 MILLIMAN, INC., d/b/a INTELLISCRIP,
15

Defendant.

CASE NO. C20-1473-JCC

ORDER

16 This matter comes before the Court on Plaintiff's motion to modify a class definition
17 (Dkt. No. 166), Defendant's motion for partial summary judgment and/or to decertify that same
18 class (Dkt. No. 167), and the parties' motions to seal (Dkt. Nos. 183, 206, 211).¹ Having
19 thoroughly considered the briefing on the motions presently before the Court, along with the
20 relevant record and oral argument, (*see* Dkt. No. 197), the Court DENIES Plaintiff's motion to
21 modify (Dkt. No. 166) as moot, GRANTS in part and DENIES in part Defendant's motion for
22 partial summary judgment and to decertify (Dkt. No. 167), and it GRANTS the motions to seal
23 (Dkt. Nos. 183, 206, 211), for the reasons explained herein.

24
25 ¹ Plaintiff also moves for partial summary judgment on whether class member's reports
26 contain inaccurate information. (*See generally* Dkt. No. 185.) However, Plaintiff asked the Court
to hold the motion in abeyance until class members are notified and have the opportunity to opt
out. (*See* Dkt. Nos. 185 at 6, 195 at 15.) Neither of which has yet occurred.

1 **I. BACKGROUND**

2 The Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 *et seq.*, mandates amongst
 3 other things that a consumer reporting agency (“CRA”), such as Defendant: (1) use “reasonable
 4 procedures” to ensure that its reports contain accurate information and, (2) within 30 days of
 5 receiving notice of an inaccuracy, conduct a “reasonable reinvestigation” of disputed items.

6 *Shaw v. Experian Info. Sols., Inc.*, 891 F.3d 749, 756 (9th Cir. 2018); *Syed v. M-I, LLC*, 853 F.3d
 7 492, 496 (9th Cir. 2017). If a CRA willfully fails to meet either of these requirements, the FCRA
 8 provides a private right of action. *See* 15 U.S.C. § 1681n.

9 The Court has described the facts of this case in prior orders. (*See, e.g.*, Dkt. Nos. 51, 86,
 10 122, 126.) To briefly summarize, Plaintiff alleges Defendant, through its IntelliScript service,
 11 compiles reports containing a consumer’s medical history and sells it to third party insurers. (*See*
 12 *generally* Dkt. No. 1.) In this case, Defendant asserts his report contained multiple erroneous
 13 records, *i.e.*, someone else’s medical history. (*Id.*) As a result, he was denied life insurance
 14 coverage. (*Id.*) Plaintiff believes this is due to Defendant’s failure to implement procedures to
 15 adequately ensure the accuracy of the information it compiles and reports out. (*Id.*) Plaintiff also
 16 alleges that, when he contacted Defendant seeking a corrected report, it failed to timely issue
 17 one, or even attempt to locate the source of its error(s). (*Id.*) Instead, it charged Plaintiff with
 18 proving the report’s inaccuracy, rather than perform its own investigation. (*Id.*) Plaintiff contends
 19 that his experience is not unique. (*Id.*) On this basis, he moved for class certification. (*See*
 20 *generally* Dkt. No. 95.)

21 In so moving, Plaintiff’s primary evidence of class-wide inaccuracy, *i.e.*, harm, was
 22 expert analysis identifying mismatched social security numbers in numerous reports issued
 23 during the relevant period. (*See id.* at 15). In opposing, Defendant pointed out that, while this
 24 may be *indicative* of an inaccurate health record contained within a report, it is not *direct*
 25 evidence of such. (*See* Dkt. No. 116 at 12.) The only way to procure such evidence would be
 26 through an individualized investigation of each reported consumer’s medical history. (*Id.*) And

1 for this reason, this case does not comply with Rule 23. (*Id.*) The Court disagreed, based on its
 2 understanding that direct evidence would be “contained within Defendant’s files” and available
 3 to Plaintiff through discovery. (Dkt. No. 126 at 8–9) (citing Dkt. No. 125 at 10).² As such, no
 4 individualized investigation would be needed. (*Id.*) It then certified the following classes:

5 1681e(b) Inaccuracy Class:

6 All persons residing in the United States (including all territories and other
 7 political subdivisions of the United States), beginning October 5, 2015 and
 8 continuing through April 29, 2022, about whom Defendant sold a report to a third
 9 party containing one or more items of information which did not pertain to the
 10 individual who was the subject of the report.

11 1681i Failure to Properly Reinvestigate Class:

12 All persons residing in the United States (including all territories and other
 13 political subdivisions of the United States), beginning October 5, 2015 and
 14 continuing through April 29, 2022, who disputed the completeness and/or
 15 accuracy of one or more items of information on an Intelliscript report for whom
 16 Defendant responded with form/template communication substantially in the form
 17 of MM_HEALY000315.

18 (Dkt. No. 124 at 14) (*as modified* at Dkt. No. 140 at 4). Now, with Plaintiff preparing to issue
 19 class notice, the parties present the Court with dueling motions implicating the same issue. (*See*
 20 Dkt. Nos. 166, 167.)

21 Plaintiff asks the Court to narrow the inaccuracy class to just those 311,226 persons for
 22 whom Defendant included certain cautionary flags in allegedly inaccurate reports. (*See* Dkt. No.
 23 166 at 3.)³ In response, Defendant moves for partial summary judgment, asking the Court to
 24 find, as a matter of law, that class-wide standing is lacking, at least for the inaccuracy class. (*See*
 25 generally Dkt. No. 167.) In the alternative, Defendant moves to decertify the inaccuracy class.
 26 (*Id.*) This is based on Plaintiff’s supposed failure to establish that an individualized inquiry

27 ² Defendant also challenged class-wide Article III standing, arguing that a naked statutory
 28 violation, such as an inaccurate report, is insufficient to establish the requisite injury. (*See* Dkt.
 29 No. 116 at 15.) The Court dismissed this argument, noting that class-wide standing need not be
 30 demonstrated at the certification stage. (*See* Dkt. No. 126 at 12.)

31 ³ It appears Plaintiff believes this makes the task of proving class-wide injury less
 32 onerous. (*See* Dkt. Nos. 166 at 3–5; 185 at 10.)

1 would *not* be required to demonstrate that Defendant included an erroneous medical record in a
 2 consumer's report. (*Id.*) In so moving, Defendant again focuses on the distinction between a
 3 mismatched social security number (*i.e.*, a personal identifier) and an erroneous health record
 4 (what it describes as a "conflict" vs. a "mixed file"). (*See id.* at 10–15.) Based on these motions,
 5 the Court stayed further proceeding(s), including issuance of class notice, pending their
 6 resolution. (*See* Dkt. No. 201.) Because standing is a threshold jurisdictional issue, the Court
 7 must address it first. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (citing *City*
 8 *of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983)).

9 **II. DISCUSSION**

10 **A. Standing**

11 For Article III standing, a plaintiff must have an injury which is concrete, particularized,
 12 and traceable to the challenged action. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61
 13 (1992). The Court asked for supplemental briefing on class-wide standing for both classes,
 14 following oral argument on the outstanding motions. (*See* Dkt. No. 198.)⁴

15 The evidentiary burden supporting standing varies, depending on the stage of litigation.
 16 *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). For example, at the pleading stage,
 17 "'general factual allegations . . . may suffice.'" *In re Apple Inc. Device Performance Litig.*, 50
 18 F.4th 769, 782 (9th Cir. 2022) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, (1992)).
 19 But after that, the burden goes up. In this instance, discovery is complete. (*See* Dkt. Nos. 146,
 20 150, 162, 164.) So Plaintiff must present the Court with at least some direct evidence of concrete
 21 injury on a class-wide basis. *See TransUnion LLC*, 594 U.S. at 431.

22 For the inaccuracy class, Plaintiff points to the same type of evidence used to support
 23 certification: expert analysis that at least 311,226 of Defendant's consumer reports issued during
 24

25 ⁴ Because standing is a jurisdictional issue, the Court may raise it *sua sponte*. *See W.*
 26 *Towboat Co. v. Vigor Marine, LLC*, 544 F. Supp. 3d 1100, 1113 (W.D. Wash. 2021) (citing *B.C.*
v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999)).

1 the relevant period included 1) a social security number not belonging to the consumer and 2) a
 2 risk indicator within that report. (See Dkt. No. 177 at 10) (citing Dkt. No. 166 at 37).⁵ But again,
 3 this is “*indicative* of a misattributed or erroneous health record, it is not *direct* evidence of
 4 injury.” (Dkt. No. 198 at 2) (emphasis in original). Said another way, this is evidence of
 5 conflicting personal identifying information—not health records. And unlike mismatched health
 6 records, the reasons for a mismatched personal identifier vary: from a simple transposition⁶ to
 7 something altogether different. Regardless, mismatched identifiers do not necessarily
 8 demonstrate misattributed health records. And without such evidence,⁷ Plaintiff cannot establish
 9 class-wide standing *at this point in the proceeding*. See *TransUnion LLC*, 594 U.S. at 431.⁸
 10 Therefore, the Court finds Plaintiff has failed to establish the requisite standing for the
 11 inaccuracy class.

12 For the reinvestigation class, Plaintiff alleges Defendant impermissibly shifts the burden
 13 onto the disputing consumer, *i.e.*, to reinvestigate reports containing possible erroneous medical
 14 records. (Dkt. No. 1 at 5.) In support, Plaintiff provides the Court with communications from
 15 Defendant instructing those consumers to contact the medical provider who generated the

16 ⁵ Plaintiff further notes that 14,170 of these also included a conflicting date of birth or
 17 last name. (*Id.*)

18 ⁶ The Court closely reviewed the expert report(s), including the technique(s) applied to
 19 weed out transposition and similar errors. (See Dkt. No. 166 at 17–27, 44–54.) They provide the
 20 Court no assurance that erroneous personal identifiers are, necessarily, *associated with someone*
 21 *else’s health record(s)*. Which is Plaintiff’s core allegation. (See Dkt. No. 1 at 4) (alleging that
 22 Defendant’s practices result in “mixed” files).

23 ⁷ Plaintiff proposes a post-trial administration process to gather such evidence. (See Dkt.
 24 No. 203 at 15.) Certainly, this is appropriate in many instances. See *Tyson Foods, Inc. v.*
 25 *Bouaphakeo*, 577 U.S. 442, 461 (2016). But not when standing is at issue. See *TransUnion LLC*,
 26 594 U.S. at 431.

27 ⁸ In Plaintiff’s motion for partial summary judgment, which he asked the Court to hold in
 28 abeyance, Plaintiff provides direct evidence of misattributed health records for 47 of the
 29 prospective class members. (See Dkt. No. 185 at 10–16) (citing Dkt. No. 184-21). It appears
 30 Plaintiff gleaned this information from evidence provided through discovery. *Id.* But he provides
 31 no assurance that this could feasibly be accomplished for the 311,179 remaining inaccuracy class
 32 members.

1 record(s), along with Defendant's representative's testimony that this is, indeed, Defendant's
 2 standard practice. (See Dkt. Nos. 22 at 18, 96-2 at 43.) This, unlike the statistical analysis of
 3 proxies described above, *i.e.*, personal identifiers, is direct evidence of harm, at least to the
 4 reinvestigation class members. *See Losch v. Nationstar Mortg. LLC*, 995 F.3d 937, 943 (11th
 5 Cir. 2021) (for FCRA purposes "wasted time is a concrete harm").

6 Accordingly, the Court DISMISSES Plaintiff's claims brought solely on behalf of the
 7 inaccuracy class, based on a failure to establish class-wide standing.

8 **B. Motions to Seal**

9 Plaintiff filed certain supporting exhibits and an unredacted version of its briefing under
 10 seal (Dkt. Nos. 184, 207, 212) and then moved to maintain those documents under seal. (See Dkt.
 11 Nos. 183, 206, 211.) He did so consistent with the protective order in this case. (See Dkt. No.
 12 28.) "[T]here is a strong presumption of public access to [the Court's] files." W.D. Wash. Local
 13 Civ. R. 5(g)(3). To overcome that presumption, a party must show "compelling reasons" to seal a
 14 document attached to a dispositive motion. *See Kamakana v. City and Cnty. of Honolulu*, 447
 15 F.3d 1172, 1178–81 (9th Cir. 2006). The Court has reviewed the documents at issue (Dkt. Nos.
 16 184, 207, 212) and concludes that a compelling reason exists to seal the underlying materials.
 17 Namely, that the documents contain proprietary information, the disclosure of which would be
 18 harmful to Defendant's business.

19 **III. CONCLUSION**

20 For the foregoing reasons, Defendant's motion for summary judgment and/or to decertify
 21 the inaccuracy class (Dkt. No. 167) is GRANTED in part and DENIED in part. The inaccuracy
 22 class is DISMISSED for lack of class-wide standing. The reinvestigation class survives.
 23 Plaintiff's motion to modify the definition of the inaccuracy class (Dkt. No. 166) is DENIED as
 24 moot. In addition, the parties' motions to seal (Dkt. Nos. 183, 206, 211) are GRANTED. The
 25 Clerk is DIRECTED to maintain Docket Numbers 184, 207, 212 under seal.

1 The parties are DIRECTED to meet and confer and provide the Court with a joint status
2 report containing a proposed revised case management schedule within 14 days of this order.
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4 DATED this 22nd day of February 2024.

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8 John C. Coughenour
9 UNITED STATES DISTRICT JUDGE
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